

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 AMANDA POPE and RICH POPE ,

11 Plaintiffs,

12 v.

13 UNITED STATES OF AMERICA,

14 Defendant.

CASE NO. 3:17-cv-05868-RJB

FIRST ORDER ON DEFENDANT
THE UNITED STATES' MOTION
TO COMPEL FRCP 35
EXAMINATION

15
16
17 THIS MATTER comes before the Court on Defendant the United States' Motion to
18 Compel FRCP 35 Examination. Dkt. 28. The Court has considered Defendant's motion,
19 Plaintiffs' Response (Dkt. 43), and the remainder of the file herein. As explained below, this
20 First Order on Defendant's Motion to Compel FRCP 35 Examination is issued prior to
21 Defendant's Reply because of its time sensitivity.

22 This case arises out of the allegation that surgeons at Madigan Army Medical Center, a
23 hospital operated by Defendant, caused a serious and permanent injury to the phrenic nerves of
24

1 Plaintiff Amanda Pope during removal of a tumor. Defendant now seeks to compel the medical
2 exam of Plaintiff Amanda Pope by an expert of Defendant's choosing. Dkt. 28.

3 Plaintiffs object to the Rule 35 examination because, according to Plaintiffs, "there is
4 literally no way for the . . . exam to occur in time for Defendant to meet its obligation to disclose
5 the substance of the examiner's testimony." Dkt. 43 at 2. This is a problem of Defendant's own
6 making, Plaintiffs argue, because Defendant had plenty of time to schedule the Rule 35
7 examination and comply with deadlines. The current deadline for disclosure of expert testimony,
8 which has been moved twice by agreement of the parties, is October 9, 2018. Plaintiffs argue in
9 the alternative that if the Court is inclined to allow Defendant conduct the Rule 35 examination,
10 it should only be allowed under certain conditions, which are detailed in Plaintiffs' Proposed
11 Order. Dkt. 43 at 5-8; Dkt. 43-1.

12 Under Rule 35, courts may order physical or mental examinations of a party. Pursuant to
13 Fed. R. Civ. P. 35(a)(2), courts "must specify the time, place, manner, conditions, and scope of
14 the examination, as well as the person or persons who will perform it."

15 Ms. Pope's Rule 35 examination is currently scheduled for this Friday, September 28,
16 2018. The Court is inclined to grant in part Defendant's motion to compel the examination now,
17 so that the Rule 35 examination may proceed this week and without delay. The unresolved
18 question is whether the examination should be done under conditions proposed by Plaintiffs.
19 Defendant's motion partially addressed Plaintiffs' proposed conditions, but in fairness to
20 Defendant, Defendant should be given the chance to file its Reply, if any, by this Thursday at
21 10am. Shortening time for Defendant's Reply is appropriate given the timing that Defendant's
22 motion would otherwise be ripe, a date less than two weeks from the expert witness deadline of
23 October 9, 2018.

